



Haim Melman  
3 Hagai St.  
Kfar-Saba 44335  
ISRAEL

Paper No. 5

**COPY MAILED**

**APR 28 2003**

**OFFICE OF PETITIONS**

In re Application of  
Melman  
Application No. 09/816,462  
Filed: March 23, 2001  
Attorney Docket No. N/A  
FOR: COMPUTER-IMPLEMENTED METHOD  
AND SYSTEM FOR BROWSING DIRECTORIES  
AND GENERATING FORMS

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**DECISION DISMISSING  
PETITION**

This is a decision on the petition under 37 CFR 1.137(a), filed April 14, 2003, to revive the above-identified application.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely reply to the Notice to File Corrected Application Papers (Notice), mailed May 3, 2001, which set an extendable period for reply of two (2) months. Having obtained no extensions of time under 37 CFR 1.136(a), this application became abandoned on July 4, 2001 for failing to reply. A Notice of Abandonment was mailed on March 17, 2003.

Petitioner alleges that he did not receive the May 3, 2001 Notice.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by (1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof; (2) the petition fee as set forth in § 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in § 1.20 (d)) required pursuant to paragraph (c) of this

section. This petition does not satisfy requirements (1) and (3).

With respect to (1), petitioner has not responded to the Notice. A copy of the May 3, 2001 Notice is enclosed. It should enable petitioner to craft an appropriate response.

With respect to (3), the showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

The Commissioner may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable". 35 USC § 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term 'unavoidable' "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

The showing required to establish nonreceipt of an Office communication must include :

1. A statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received.
2. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.<sup>1</sup>

A review of the record indicates no irregularity in the mailing of the May 3, 2001 Notice and in the absence of any irregularity there is a strong presumption that the communication was properly mailed to the applicant at the correspondence address of record. This presumption may be

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<sup>1</sup> See notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

overcome by a showing that the aforementioned communication was not in fact received.

Petitioner has not proven nonreceipt because petitioner has not stated that he searched the docket records and petitioner did not include a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed. If petitioner does not have a formal docket, petitioner should submit a copy of the means by which he keeps track of patent application due dates (i.e. a calendar). The docket record must be referenced in petitioner's statement.

If petitioner is unable to prove non-receipt, petitioner may wish to file a petition to revive under the unintentional standard of 37 CFR 1.137(b). The fee for filing a petition under 37 CFR 1.137(b) is \$650.00.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if a petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

For petitioner's convenience, a blank copy of PETITION FOR REVIVAL OF AN APPLICATION ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)

Further correspondence with respect to this matter should be addressed as follows:

By mail until 05/01/03:      Commissioner for Patents  
Box DAC  
Washington, D.C. 20231

By mail on or after 05/01/03: Mail Stop PETITION  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

By facsimile:                      (703) 308-6916  
Attn: Office of Petitions

By hand:                              Office of Petitions  
2201 South Clark Place  
Crystal Plaza 4, Suite 3C23  
Arlington, VA 22202

Telephone inquiries pertaining to this matter may be directed to the undersigned at (703) 308-6712.



E. Shirene Willis  
Senior Petitions Attorney  
Office of Petitions

Enclosures: May 3, 2001 Notice to File Corrected Application Papers

blank PTO/SB/64-- PETITION FOR REVIVAL OF AN APPLICATION  
ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)

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